88-221

IN THE SUPREME COURT
OF THE UNITED STATES

No. _____

HUGH MILLER,
Petitioner,

vs.

STATE OF KANSAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KANSAS

LESLIE F. HULNICK
KIEHL RATHBUN
Attorneys at Law
924 North Main
Wichita, Kansas 67203
316-265-3391
Attorneys for
Petitioner

QUESTIONS PRESENTED FOR REVIEW

Did the trial Court's denial of Defendant's Motion for Mistrial deny him due process of law?

Did the prosecution, by stating its belief that the Defendant would offer perjured testimony cause the jury to infer the existence of perjury from the absence of testimony?

INDEX

TABLE OF CASES

STATUTES

IN THE SUPREME COURT
OF THE UNITED STATES

No. _____

HUGH MILLER,
Petitioner,

vs.

STATE OF KANSAS,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES SUPREME COURT

The Petitioner, Hugh E. "Bo" Miller, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Kansas filed March 10, 1988, Petition for Review denied in the Supreme Court of the State of Kansas May 4, 1988.

OPINION BELOW

On March 10, 1988 the Court of Appeals of the State of Kansas entered its opinion

confirming the conviction of Petitioner for aggravated battery in violation of K.S.A. 21-3414. A copy of this opinion appears in the appendix hereto marked Appendix B. Petition for Review in the Supreme Court of the State of Kansas was perfected by Petitioner, which Petition for Review was denied on May 4, 1988. A copy of the denial is included herein as Appendix A.

JURISDICTION

28 U.S.C. Subsection 2101(d).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

K.S.A. 21-3414.

STATEMENT OF FACTS

On the evening of November 23, 1984 the Appellant, Bo Miller, was leaving a tavern and noticed a loud argument going

on in the street. He heard a member of that argument say to another, "I will shoot you too, Punk." At about that time a shot was fired in his direction. (Tr. 129 & 130).

At that point he ducked behind his car (Tr. 130) and pulled his shotgun out of the back seat (Tr. 131) and returned fire. He was afraid for his life (Tr. 131). He then got in his car (Tr. 132) and left to find a phone to call the police.

Witnesses testified that they heard at least two shots (Tr. 96, 58, 72, 78, 90). Officers found only one spent shotgun shell at the scene, and after diligent search in the street, yards and sides of houses, failed to find any other shell or shell casings (TR. 20).

At trial, in the State's opening statement, the State alleged that someone named Ralph was asked to lie for the

Appellant (Tr. 6,7). The defense then moved for a mistrial (Tr. 7) on the basis of prosecutorial misconduct. Said motion was overruled. There was never any evidence introduced at trial concerning Mr. Ralph, nor what his statement might have been, and he did not testify.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals for the State of Kansas denies similarily situated defendants a fair trial, as well as depriving Petitioner of a fair trial.

Under Kansas law, a trial court's ruling as to whether a mistrial should be declared will not be overturned in the absence of abuse and discretion; State v. Mitchell, 3 Kan. App. 2d, 635 (1975); State v. Griffin, 3 Kan. App. 2d, 433; State v. Jacques, 2 Kan. App. 2d, 277. Kansas Statutes Annotated 22-3423(1)(c) authorizes

the Court to declare a mistrial when "Prejudicial conduct ... makes it impossible to proceed with the trial without injustice to either the Defendant or the Prosecution". In this case, the Prosecution, during opening statements, told the jury that a certain Mr. Ralph threatened a witness, a Mr. Marshall, with unspecified dire consequences should Mr. Marshall testify (Tr. 6). The Prosecutor also told the court that "Mr. Ralph was going to get up and lie on behalf of the Defendant Miller". (Tr. 7).

This presented the Defense with a dilemma. The Defendant could either call a witness which the jury had already been told not to believe, or they could forego evidence which, in view of the Prosecutor's statements, we can assume was favorable to the Defendant.

As it happened, the State presented no evidence whatsoever to

substantiate statements of witness intimidation or perjury. The prejudice to the Defendant here is obvious. The jury is led to believe that the Defendant and persons acting on his behalf will intimidate witnesses and lie, even though there is no admissible evidence from which they may draw that conclusion.

Judicial discretion is abused only where no reasonable man would take the view adopted by the trial court. If reasonable men could differ as to the propriety of the action taken, then it cannot be said that the trial court abused discretion. State v. Wilkins, 220 Kan. 735 (1976). The Court asked the State how evidence of intimidation and perjury was admissible in one form or another at least six times. The final straight answer from Mr. Skinner, on behalf of the State, was "I don't think I can show that, Judge" (Tr.

9). So, notwithstanding obvious prejudice to the Defendant, a finding that evidence which would have substantiated the State's statements would be inadmissible, the trial court still overruled the Defendant's motion for mistrial. The Defendant fails to see how any reasonable man could take the view adopted by the trial court.

In State v. Folkerts, 229 Kan. 608, there had been evidence that the Defendant had falsified his trucker's log book. During closing arguments the State sought, improperly, to impeach the Defendant's character saying "... If a person is to lie about something as insignificant as a log book ...". That comment was characterized, in the court's opinion, as clearly inappropriate and constituting error. The State's counsel was excused as being inexperienced and over-zealous. The same cannot be said of

Mr. Skinner. While his zeal may be appropriate, he is certainly not inexperienced. He is a capable, veteran prosecutor.

Further, the statements complained of in Folkerts were in closing arguments, as were those in State v. Hanks, 236 Kan. 524 (1985); State v. McGee, 201 Kan. 566; and State v. Robinson, 219 Kan. 218 (1976); where the Court ruled that the Prosecution is entitled to considerable latitude in closing argument and no prejudicial error exists if the statements complained of were provoked. In this case, the statements the Appellant complains of were in opening, not closing, had no basis in the evidence, and could not have been provoked because the State always goes first.

State v. Culbertson, 214 Kan. 884 (1974) states:

"A Mistrial results when, before trial is completed, the

trial court concludes there is some error or irregularity that prevents a proper judgment being rendered."

Vilander v. Hawkinson, 183 Kan. 214, Hendricks v. Phillips Petroleum Company, 203 Kan. 140. In this case, the Defense relied on the rules of self-defense (Tr. 145). The essential question for the jury to decide then was whom to believe. They were precluded from the outset from doing so by the State's prejudicial statements, telling them that the Defense was trying to intimidate witnesses and would present perjured testimony. In Jacques, supra, citing, State v. Hamilton, 222 Kan. 341 (1977) the Court said:

"Where the evidence of guilt is of such direct and overwhelming nature that it can be said that the misconduct of counsel ... could not have affected the

results of the trial,
such misconduct is harmless
error".

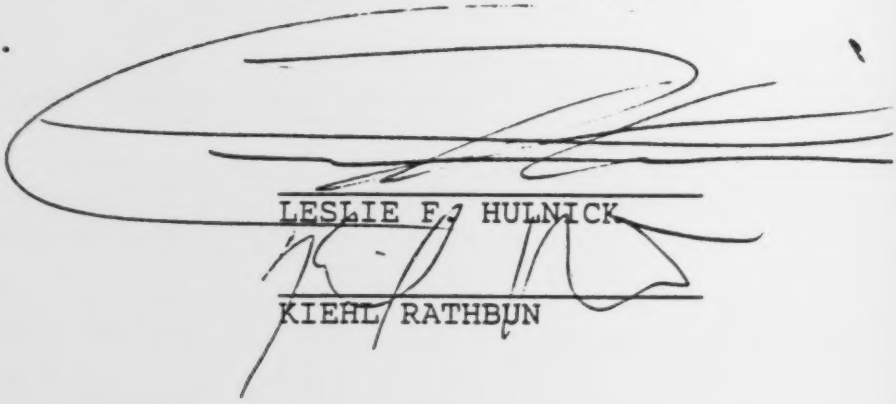
In this case, the material actions of all persons concerned are not in dispute; the only question is the reasonableness of the Appellant's belief that deadly force is necessary. We submit that the Prosecutor's misconduct not only affected the outcome of the trial, but caused the Defense to change it's trial tactics, thereby weakening it's position.

By telling the jury in opening statement that the Defendant intended to produce perjured testimony the jury's impartial consideration of the Defendant's case was tainted beyond all hope of cure. If the Defendant presented witnesses the jury would have been told that the witnesses were lying. When the Defendant elected to present no testimony or evidence, resting upon his Fifth Amendment Rights, the jury could only assume that the

reason he was presenting no witnesses was that the State had learned that the witnesses would lie. The prosecutor's remarks were so prejudicial that a finding of prejudicial error is unavoidable. Frazier v. Cupp, 394 U.S. 731, 22 L.Ed.2d 684, 89 S.Ct. 1420 (1969).

CONCLUSION

Based on the foregoing arguments, Petitioner requests that this Court grant a review.



LESLIE F. HULNICK

KIEHL RATHBUN

IN THE SUPREME COURT
OF THE UNITED STATES

No. _____

HUGH E. MILLER,
Petitioner,

vs.

STATE OF KANSAS,
Respondent.

AFFIDAVIT OF SERVICE

Leslie F. Hulnick, being first duly sworn, deposes and states:

That in accordance with Rule 28, Supreme Court Rules, I had placed in the United States Mail, postage-paid, copies of:

1. Original Petition for Writ of Certiorari to the United States Supreme Court;

2. Affidavit of Service; prior to 12:00 p.m. on the 5th day of July, 1988, to:

40 copies to:

Clerk, Reporter of Decisions,
Marshal and Librarian
1 First Street, N.E.
Washington, D.C. 20543

3 copies each to:

Clark Owen
District Attorney
Sedgwick County Courthouse
535 N. Main
Wichita, Kansas 67203

Robert T. Stephan
Kansas Attorney General
301 W. 10th
Topeka, Kansas 66612

1 copy to:

Hugh E. Miller
1725 North Waco
Wichita, Kansas 67203

LESLIE F. HULNICK

SUBSCRIBED AND SWORN TO before me this 3rd day of August, 1988.

NOTARY PUBLIC

My appointment expires: 08/27/88

DANIELA G. YARBERRY
NOTARY PUBLIC
STATE OF KANSAS
MY APPT. EXPIRES 8/27/88

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

HUGH MILLER,

Plaintiff-Petitioner,

vs.

THE STATE OF KANSAS,

Defendant-Respondent.

CERTIFICATE OF SERVICE

COMES NOW Leslie F. Hulnick and certifies that three copies of the corrected Petition for Certiorari were placed in the United States Mail, postage-paid, addressed as follows:

Clark Owen
District Attorney
Sedgwick County Courthouse
535 N. Main
Wichita, Kansas 67203

Robert T. Stephan
Kansas Attorney General
301 W. 10th
Topeka, Kansas 66612

On this 5 day of August, 1988.

LESLIE F. HULNICK

SUBSCRIBED AND SWORN TO before me this 5 day of Aug, 1988.

Sharilyn A. Jordan
NOTARY PUBLIC

Exp. 8-3-90

APPENDEX A

IN THE SUPREME COURT OF THE STATE OF KANSAS

STATE OF KANSAS,	)	
	)	
Appellee,	)	
	)	
v.	)	Case No. 87-60738-A
	)	
HUGH "BO" MILLER, JR.	)	
	)	
Appellant.	)	
	)	

You are hereby notified of the following action taken in the above entitled case:

Petition for Review.

Denied.

Yours very truly,

LEWIS C. CARTER
Clerk, Supreme Court

DATE: May 4, 1988

APPENDEX B

NOT DESIGNATED FOR PUBLICATION

NO. 60,738

IN THE COURT OF APPEALS OF
THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v

HUGH E. "BO" MILLER, JR.,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; PAUL BUCHANAN, Judge. Opinion filed March 10, 1988. Affirmed.

Kiehl Rathbun, of Wichita, for the Appellant.

Debra L. Barnett, assistant district attorney, Clark V. Owens, district attorney, and Robert T. Stephan, attorney general, for the appellee.

Before ELLIOTT, P.J., DAVIS and LARSON, JJ.

Per Curiam: Hugh E. "Bo" Miller, Jr., appeals his conviction of aggravated battery. K.S.A. 21-3414.

On November 23, 1984, at about 10:30 p.m., Thomas Marshall went to visit his two children, who were living with their mother in the area of 29th Street and Park Place, Wichita, Kansas.

Marshall had been drinking and had two more drinks after he arrived at his ex-wife's house. Marshall began to argue with his ex-wife's boyfriend, Gary Williamson, and the two continued to argue in the front yard. Marshall said he was going to get a gun and shoot Williamson.

Marshall got into his car, and Williamson broke his windshield with a

rock. Marshall drove around the block, got out of his car, and yelled for Williamson to come back outside.

Velma Roland, a next-door neighbor, heard the argument and decided to go to another neighbor's house to call the police. A man, later identified as the defendant, Hugh "Bo" Miller, Jr., came out of a nearby tavern and asked Roland what was going on. Roland explained the problem to Miller, who told Roland not to call the police and said he would take care of the situation. Roland entered the house and called the police. She then heard two gunshots.

Miller fired one shot in the air and instructed everyone to leave the area. Williamson ran toward the house, leaving Marshall near his car. Miller pointed the gun at Marshall and told him that he was

going to blow his head off. Marshall, who was reaching for his car door, turned around and raised both of his arms into the air but told Miller to go ahead and shoot.

Miller shot Marshall in the neck, resulting in damage to his vocal cords and arms.

Miller drove off in his car and was subsequently apprehended by the Wichita Police Department outside the Side Track Club. Miller told Officer Chrisman he shot a man in self-defense in the area of 29th and Park Place.

Miller told the officer the man had driven by him and a friend as they were leaving their vehicle to enter the tavern and fired three shots at them. Miller told the police officer he reached into his car, grabbed his loaded shotgun, and fired it

one time at the man.

A complaint charging Miller with one count of aggravated battery was filed. He pled not guilty and the jury returned a verdict of guilty. Miller was sentenced ten to forty years under the Habitual Criminal Act. The sentence was later modified to five to twenty years.

Miller contends the following remark made by the prosecutor during the opening statement in his jury trial was so prejudicial as to deny him a fair trial:

> "The evidence is going to show that after this case was filed Mr. Marshall caused or [was] told by a gentleman by the name of Mr. Ralph that if he testified he was going to have something bad happen

to him and also told by Mr. Ralph..."

Interrupting the prosecutor, the defense counsel objected to the remark, and the judge ordered the jury to leave the courtroom. The prosecutor, out of the hearing of the jury, continued his statement "[t]hat Mr. Ralph was going to get up and lie on behalf of the Defendant Miller." Defense counsel moved for a mistrial on the grounds anything that happened between Marshall and Ralph subsequent to the case being filed was immaterial and the jury was prejudiced. The prosecutor argued that evidence a witness had threatened a victim is admissible.

The Court asked the prosecutor how it was admissible evidence if someone independently threatened a witness and

whether the prosecutor had evidence that Miller was involved. When the prosecutor said he couldn't show the defendant's involvement, the court stated such evidence would not be admissible.

The court, however, did not order a mistrial, but admonished the jury upon its return to ignore the statements made by the prosecution about any conversation between Marshall and a person by the name of Ralph.

There was never any evidence introduced at trial concerning Ralph, and he did not testify.

Miller contends the jury was led to believe he or persons acting on his behalf would intimidate witnesses and lie, even though there was no admissible evidence from which they might draw that

conclusion. Miller contends he was prejudiced in his defense because his theory at trial was that he acted in self-defense and such defense required his testimony to be believed.

The Kansas Supreme Court has held the prosecution is entitled to reasonable latitude in its opening statement.

> "Proof which the prosecuting attorney anticipates in the trial of a case frequently fails to come up to expectations, and so the tendency is to permit a prosecuting attorney a reasonable latitude in stating to the jury the facts he proposes to prove. Where no substantial prejudice results, and there is nothing to show that the prosecuting attorney acted in bad faith,

> appellate courts usually refuse . . . because of a reference by the prosecuting attorney to matters which he subsequently made no attempt to prove, or for one reason or another was unable to prove. {Citations omitted.}
>
> "Under the foregoing rule, disposition of an appellate claim on this point turns on the degree of prejudice resulting from the unsupported remarks of the prosecuting attorney." State v. Campbell, 210 Kan. 265, 279, 500 P.2d 21 (1972).

The Court in Campbell cited State v. Welsh, 138 Kan. 379, 26 P.2d 592 (1933), where the prosecuting attorney in his opening statement referred to the promises of material reward by the defendant to induce certain witnesses not

to testify against him. Defendant had further threatened, the prosecuting attorney said, if he was arrested, to defeat the sheriff for reelection. In presenting the State's case, the prosecuting attorney did not present evidence to prove the assertions made in his opening statement. The trial court instructed the jury to confine its deliberations to the evidence and the county attorney was not deemed guilty of misconduct sufficient to justify a mistrial.

The trial court in this case specifically instructed the jury as follows:

> "Statements, arguments, and remarks of counsel are intented to help you in understanding the

evidence and in applying the law, but they are not the evidence. You should disregard any such utterance that has no basis in the evidence."

If a degree of prejudice does exist, it is slight. See State v. Folkerts, 229 Kan. 608, 629 P.2d 172 cert. denied 454 U.S. 1125 (1981).

In view of the overwhelming evidence against Miller, we find and hold the prosecutor's comment was harmless error. K.S.A. 60-2105. It was not an abuse of discretion for the trial court to deny Miller's motion for a mistrial.

In addition, the jury was properly instructed to ignore the prosecutor's statement.

Affirmed.

APPENDIX C

IN THE EIGHTEENTH JUDICIAL DISTRICT
DISTRICT COURT, SEDGWICK COUNTY, KANSAS
CRIMINAL DEPARTMENT

THE STATE OF KANSAS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 84CR1866
	)	
HUGH "BO" MILLER, JR.,	)	
	)	
Defendant.	)	
	)	

JOURNAL ENTRY

On this 15th day of April, 1985, this case comes on for trial, the defendant having been bound over for arraignment by the Honorable Owen Ballinger, Position B of the Eighteenth Judicial District Court, on the Information charging the defendant with Aggravated Battery, contrary to K.S.A. 21-3414. The State of Kansas appears by its attorney, Roger C. Skinner, Assistant District Attorney. The defendant appears in person and by his attorney, Lyle Britt.

Thereupon, a Jury is duly impaneled and sworn and evidence is presented from court day to court day.

The following witnesses were sworn and testified:

R.D. Voigt, Sedgwick County, Kansas;
P. Cunningham, Sedgwick County, Kansas;
Thomas Marshall, Sedgwick County, Kansas;
Fred Baldwin, Sedgwick County, Kansas;
Tommy Sanders, Sedgwick County, Kansas;
Mary Valma Roland, Sedgwick County, Kansas;
Barbara Marshall, Sedgwick County, Kansas;
R.L. Chrisman, Sedgwick County, Kansas;
Hugh E. "Bo" Miller, Sedgwick County, Kansas.

Thereafter, on the 16th day of April, 1985, the Jury after having received the evidence, instructions of the Court, and the arguments of counsel and having duly deliberated, returned the following verdict in open court:

"We, the Jury, impaneled and sworn in the above entitled case, do upon our oath find the defendant guilty as charged."

Date of this verdict April 16, 1985.

/s/Eugene E. Peters
Foreman.

Thereupon, the Court accepted the verdict, excused the Jury, and continues this case for sentencing and/or motion for new trial.

Thereafter, on the 11th day of June, 1985, all parties appear as aforesaid. The defendant's motion for new trial was heard by the Court, who, after examining the record, hearing the statements of counsel and being fully advised in the premises, denies said motion.

The Court moved for judgment of sentence herein under the Habitual Criminal Act, in accordance with K.S.A. 21-4504 (1)(a)(b), by showing to the Court that the defendant herein, Hugh E. "Bo" Miller, Jr., has been previously convicted of the felony of 2nd Degree Burglary and Larceny in Sedgwick County District Court in 1958, which motion was by the Court sustained.

The Court inquires of the defendant if he has any legal cause to show why judgment of sentence should not be pronounced against him;

the defendant failed to show any such cause and none appearing, there being none, the court then proceeds to pronounce judgment of sentence against the defendant.

IT IS THE SENTENCE OF THIS COURT AND IT IS HEREBY CONSIDERED, ORDERED, ADJUDGED AND DECREED that the defendant is hereby committed to the custody of the Secretary of Corrections for imprisonment for a period of not less than ten (10) nor more than forty (40) years on the charge of Aggravated Battery, contrary to K.S.A. 21-3414 and in accordance with K.S.A. 21-4501(c) and 21-4504(1)(a)(b). Defendant shall pay the costs of this action, including witness fees to the Clerk of this Court.

IT IS FURTHER ORDERED that the Clerk of this Court deliver two (2) certified copies of this judgment and commitment to the Sheriff of Sedgwick County, Kansas, or one of his duly authorized deputies. It is further ordered that such certified copies serve as the commitment of

the defendant and that said Sheriff or authorized deputy transport the defendant to the custody of the Secretary of Corrections for imprisonment, and make due return thereof.

The Court further advised the defendant of his right to appeal to the Appellate Courts of the State of Kansas and sets Appeal Bond in the amount of $10,000.00.

IT IS FURTHER ORDERED that for the purpose of computing defendant's sentence, his parole eligibility and conditional release dates thereunder, that such sentence shall be computed from a date to be determined when the defendant is removed from his appeal bond and his conviction is affirmed.

IT IS SO ORDERED.

/S/ PAUL BUCHANAN,
JUDGE, Sedgwick County,
Kansas

APPROVED BY:

/S/ROGER C. SKINNER
ASSISTANT DISTRICT ATTORNEY

/S/ LYLE BRITT
ATTORNEY FOR DEFENDANT

APPENDIX D

KANSAS STATUTES ANNOTATED 21-3414. Aggravated Battery. Aggravated battery is the unlawful touching or application of force to the person of another with intent to injure that person or antoher and which either:

(a) Inflicts great bodily harm upon him; or

(b) Causes any disfigurement or dismemberment to or of his person; or

(c) Is done with a deadly weapon, or in any manner whereby great bodily harm, disfigurement, dismemberment, or death can be inflicted.

Aggravated battery is a class C felony.